

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Alexandria Division

UNITED STATES OF AMERICA)	
)	
v.)	Criminal No. 01-455-A
)	
ZACARIAS MOUSSAOUI,)	
Defendant)	

**GOVERNMENT’S REPLY TO DEFENDANT’S RESPONSE TO
GOVERNMENT’S SUPPLEMENTAL MOTION AND INCORPORATED
MEMORANDUM REGARDING MENTAL HEALTH EVIDENCE**

The United States respectfully replies to defendant’s Response to Government’s Motion and Supplemental Motion Regarding Mental Health Evidence:

Fed. R. Crim. P. 12.2 requires, in the plainest of terms, that the defendant give notice and discovery to the Government whenever it plans to offer mental health evidence at trial, whether it be a guilt or penalty phase. The Rule’s “objective is to give the government time to prepare to meet the issue, which will usually require reliance upon expert testimony.” Fed. R. Crim. P. 12.2, Advisory Committee Notes, second paragraph. The defense does not want this Court to follow Rule 12.2. They do not want to provide timely notice; they do not want to provide the normal discovery; and they do not want the defendant to be examined by the Government before they put on their mental health evidence in the penalty phase. The defense contends that these are procedures “designed for the normal case,” Opposition at 5, and that they should not apply here because the “instant case stands in sharp contrast to most, if not all, federal capital prosecutions when it comes to mental health evaluations,” Opposition at 2. The arguments are baseless.

There is nothing abnormal about this case and spinning it as unique is really just a nice way for the defense to say that they have found absolutely no law to support their request to break

with established practice. Indeed, the defense cites no authority — not a single case even suggesting a basis for foregoing standard Rule 12.2 practice here. Basically, the defense hangs its hat on the fact that the Government already has access to information about the defendant’s mental condition in the wake of defense counsel’s repeated attacks upon defendant’s competence. This information far from satisfies the defense’s discovery obligations for a number of reasons set forth below, including the fact that the currently available information relates to the defendant’s competence to stand trial and enter a plea, an issue much narrower than those likely to arise in the penalty phase. Defense counsel themselves generated this information, when they chose to put their client’s competence in issue, and they now use the information’s existence as an excuse to bypass Rule 12.2. The Court should have none of it.

I. The Decision to Offer Mental Health Evidence

We start by reminding the Court that it is the defendant — and not defense counsel — who decides whether to offer evidence about his mental health in mitigation. As we have repeatedly stated, a defendant may preclude the introduction of mitigating evidence on his behalf during a penalty phase. United States v. Davis, 285 F.3d 378, 384-85 (5th Cir. 2002); Singleton v. Lockhart, 962 F.2d 1315, 1322 (8th Cir. 1992); Silagy v. Peters, 905 F.2d 986, 1007-08 (7th Cir. 1990); see also Blystone v. Pennsylvania, 494 U.S. 299, 306 n. 4 (1990) (noting that the defendant precluded the introduction of any mitigating evidence). The defense cites no case to the contrary. Simply put, it is the defendant’s life and, therefore, he alone may decide what evidence to offer to save his life.¹

¹ Rule 12.2 also speaks in terms of whether a “defendant,” not defense counsel, intends to offer evidence about his mental health during a capital sentencing proceeding. See Fed. R. Crim. P. 12.2(b), (c)(1)(B), (d). Similarly, the Federal Death Penalty Act (FDPA) provides:

To date, the defendant has made clear that he opposes the introduction of evidence regarding his mental health. See, e.g., Docket nos. 306, 314, 315, 329, 393, 662, 838, 1016. Defense counsel apparently realize that the defendant has no desire to introduce mental health evidence, when they state that the “defense has no intention of conducting such [psychological] testing; and the defendant plainly would not cooperate with such an effort.” Opposition at 5 n.2; see also id. at 4 (“there is no prospect that the defendant will submit to any mental health evaluations in the future”). Defense counsel may not override their client’s specific instructions against the introduction of such evidence. This is particularly true in light of the Court’s ruling on defendant’s competency.²

Thus, the Court should first determine whether the defendant intends to offer mental health evidence in mitigation. If the answer is no, this issue should end with the Court precluding defense counsel from acting contrary to their client’s instructions. If the answer is yes, Rule 12.2 must be followed.³

“The defendant may present any information relevant to a mitigating factor.” 18 U.S.C. § 3593(c).

² See 4/20/05 Tr. 11 (the Court: “this defendant has always struck this Court as articulate, intelligent, fully understanding the proceedings, and although his world view may be significantly different from ours and therefore at times perhaps difficult to understand, in my view, that does not strike – make a basis for arguing that he is incompetent.”); 4/22/05 Tr. 23 (the Court: “Mr. Moussaoui is an extremely intelligent man. He has actually a better understanding of the legal system than some lawyers I’ve seen in court.”).

³ So the Court can properly address whether the defendant intends to offer mental health evidence in mitigation, the Government suggests that the Court conduct an *in camera*, *ex parte* hearing with the defendant and defense counsel to determine the defendant’s intention. During such a hearing, the Court should explain to the defendant the mitigating factors implicated by mental health evidence and how such evidence could be used by defense counsel during the penalty phase. The Court should then ask the defendant about whether he would like defense counsel to introduce such evidence. Defendant’s final decision, but nothing more, should be

II. The Government's Right to Notice

Rule 12.2(b) provides that the defendant “must” provide notice of his intention to introduce mental health evidence during the penalty phase. There are no exceptions.⁴ Thus, the defense in this case has agreed to provide notice of (1) the mental health experts who will testify or whose opinions will be relied upon and their qualifications, and (2) a summary of the diagnosis or diagnoses of said mental health experts and a summary of the basis for their opinions.

Opposition at 11. The defense, however, wants to delay filing their notice until December 15, 2005. Opposition at 12 n.9. That is far too long. The Court should impose a deadline of August 1, 2005 for notice, if in fact the defendant informs the Court that *he* wishes to offer mental health evidence at all in the penalty phase.

There is good reason for requiring that the notice be provided as soon as practicable, and no reason why it need wait until as late as mid-December, a mere three weeks before jury selection is set to begin. First, under our proposal, the defense has more than six weeks to draft their notice, which is more than ample time to do so, given that the defense does not intend to test the defendant, and, as a result, already has all of the information that they need to file the notice. Second, the Government will need substantial time in advance of trial to hire experts and have them review the appropriate records in this case. We cannot select appropriate experts until the

disclosed to the Government. Such a procedure would ensure that the defendant makes an informed decision on this issue with no strategic advantage to the Government.

⁴ As we stated in our moving papers, the Government's discovery rights regarding the introduction of evidence of a defendant's mental health during a penalty phase — including notice — were originally recognized in case law, including Judge Payne's opinion in United States v. Beckford, 962 F. Supp. 748, 760 (E.D. Va. 1997), that is now codified in Rule 12.2. Rule 12.2 was amended, effective December 1, 2002, to address specifically mental health evidence in capital prosecutions.

defense provides Rule 12.2 notice because we will not, until then, know the nature of the expert testimony that the defense intends to offer.⁵ Third, an examination of the defendant — which, as demonstrated below, the Government has a right to do, if the defendant opts to offer mental health evidence — will require a great deal of time. As an initial matter, such an examination must occur sufficiently in advance of jury selection so that the pressures of trial on the defendant do not skew the results. See Beckford, 962 F. Supp. at 762 n.13. In addition, the Government will need time to determine the appropriate expert to examine the defendant, contract with the expert, have the expert review voluminous records, and then have the expert examine the defendant. Obviously, early notice is required for this reason alone.

Rule 12.2(b) itself supports the concept of early notice, providing that notice should be given at the time of pretrial motions. The court in United States v. Catalan Roman recently addressed the importance of early notice of mitigation experts in advance of a capital sentencing:

Although the essential policy of facilitating the truth-seeking process is diminished during the sentencing phase because the jury has already rendered its guilty verdict, there nevertheless remain myriad factual issues during the sentencing phase. It is no less imperative that the facts affecting a sentencing determination be as trustworthy as those informing a guilty verdict, and it is beyond dispute that the adequate preparation eased by early disclosure will contribute to the truth-seeking process, resulting in a more reliable sentencing determination.

United States v. Catalan Roman, __ F. Supp.2d __, 2005 WL 1389612, at *5 (D.P.R. June 7, 2005); see also id. at *7 (“a fair right of rebuttal . . . would be rendered meaningless against

⁵ Defense counsel acknowledge that the Government may need to explore the use of experts other than Dr. Patterson for use during the penalty phase. See Opposition at 4 (“the Government need not limit itself to Dr. Patterson, since plainly any expert the Government might now choose would have the benefit of his report and, presumably, the opportunity to discuss his evaluation with him”).

expert testimony without the opportunity for adequate preparation”). Thus, other than a general desire to “hide the ball” by defense counsel, there is simply no reason at this stage of the case — three and one-half years after indictment and two months after the defendant’s guilty plea— for the defense to further delay filing their mental health notice. The defense should be ordered to file their notice by August 1, 2005.⁶

III. The Government’s Right to Examine the Defendant

Defense argues that the Government should not be permitted to conduct a mental health examination of the defendant, mainly because they claim that the Government has enough mental health information about the defendant already. The argument is meritless.

Taking an examination of the defendant, who plans to offer mental health evidence, is standard operating procedure under Rule 12.2. Subsection (c)(1)(B) empowers the court to “order the defendant to be examined under procedures ordered by the court,” where the defendant has provided notice under Rule 12.2(b), and the Government has moved for the examination. Subsections (c)(2), (c)(3), and (c)(4) establish a protocol for handling the results of such examinations. Subsection (d) provides sanctions for failure to comply, stating that failure to give notice under subsection (b), or to submit to an examination ordered pursuant subsection (c),

⁶ This timetable will also allow the Government to file its notice, as requested by defense counsel (see Opposition at 11), in a timely fashion. If the Court orders the defense to provide notice by August 1, 2005, the date we propose, we suggest filing our notice no later than November 15, 2005. The defense will then still have ample time to exercise its prerogative under Beckford to re-affirm, or not, its intention to introduce mental health evidence, which we suggest should be filed not later than January 3, 2006. We disagree with defense counsel’s suggestion that the timing of such re-affirmation depends on whether the Court bifurcates the penalty phase (see Opposition at 12 n.10), because, even if the Court bifurcates the penalty phase, mental health evidence will have no role in the eligibility portion. Consequently, bifurcation will have no impact on the use of this evidence.

may result in the exclusion of “any expert evidence from the defendant on the issue of the defendant’s mental disease, mental defect, or any other mental condition bearing on the defendant’s guilt or the issue of punishment in a capital case.”

The defense asks the Court to simply disregard the procedures set forth in the Rule. The Court should not do so, as such a step would be completely unprecedented. To our knowledge, no court has denied the Government an opportunity to examine a defendant who puts his mental health at issue during a penalty phase and, if such a case does exist, surely defense counsel would have cited it in their papers. We recognize that defense counsel represent a client with whom they have no relationship (in large part caused by their never-ending assault upon his mental health), but his contumacy should not be used to impede the truth-seeking function that the Government’s discovery rights are designed to achieve. Indeed, in the case most analogous to this case — the prosecution of the Unabomber — the court did not depart from established procedure because of that defendant’s insolence, as the defense asks the Court to do so here. Instead, the court in the Unabomber case ordered that Government experts would be entitled to examine the defendant if he intended to offer mental health evidence during the penalty phase. See United States v. Kaczynski, 1997 WL 609991 (E.D. Cal. 1997) (ordering the defendant to submit to a mental health examination by the Government); United States v. Kaczynski, 1997 WL 668395 (E.D. Cal. 1997) (granting the Government’s request to have the defendant examined by two different mental health experts due to the “inexactitude of the psychiatric discipline and the government’s obligation to ensure that justice is done by seeking the truth”).

Defense counsel offer three reasons why this Court should treat this case differently from every other capital prosecution in the federal system. First, they argue that the defendant has

already been examined by Dr. Patterson, claiming that the Government should be satisfied with that examination. Second, the defense claims that there will be no disadvantage to the Government if it cannot examine the defendant because the defense themselves will not examine the defendant (because he will not agree to be examined). Third, the defense accuses the Government of invoking its Rule 12.2 rights merely to obtain a sanction barring the defense from offering any mental health evidence. None of these arguments has merit.

As for defense counsel's first argument, it bears remembering that defense counsel elected to challenge the defendant's competency, not the Government. Their unrelenting assault upon his competency lead to Dr. Patterson's examination of the defendant, not any strategy by the Government. See, e.g., 4/22/02 Tr. 37 (Mr. Dunham: "I do believe that under Faretta, a competency inquiry is warranted before the motion to proceed *pro se* should be granted"); docket nos. 109, 110, 356, 361. Moreover, Dr. Patterson's examination of defendant was purely for competency, not to rebut any mitigation evidence that the defense may offer.⁷ Undoubtedly, defense counsel will offer mental health evidence for which the defendant has never been examined. Thus, Dr. Patterson's short examination of the defendant, for a limited purpose, is far from an adequate substitute for the discovery to which the Government is entitled under Rule 12.2. Rule 12.2 says nothing about substitutes, nor does it carve out any limitation on the Government's right to examine a defendant in cases where the defendant has undergone a competency examination, notwithstanding the fact that the Rule discusses competency examinations, see Fed. R. Crim. P. 12.2(c)(1).

⁷ Likewise, the reports of the defense experts were also prepared for the limited purpose of examining the defendant's competency.

In the same vein, the defense suggests that the Government should be satisfied with the defendant's many writings and observations of him in open court on numerous occasions. This same argument was rejected in United States v. Kaczynski, 1997 WL 609991, at *3, in which the court wrote that "an independent medical evaluation of Kaczynski . . . is the most trustworthy means for the government to verify Kaczynski's claims." The court further stated:

Given the nature of the psychiatric skill involved in unmasking "the human personality," and penetrating the functioning of the mind and the difficulty of detecting psychiatric phenomena, it would be unfair to the government to permit Kaczynski to use expert testimony without allowing the government the opportunity to prepare an effective means to rebut the testimony Since the government is required to shoulder a heavy burden of proof in a criminal case, it should not be denied the only reliable means of ascertaining the truth concerning a defendant's mental status.

Id. (internal citations, quotation marks and brackets omitted). The Fourth Circuit clearly agrees with this view. See United States v. Albright, 388 F.2d 719, 724 (4th Cir. 1968) (forcing government experts to rely on courtroom observations serves as a "poor and unsatisfactory substitute[] for testimony based upon prolonged and intimate interviews between the psychiatrist and the defendant"). Simply put, the writings and courtroom observations are no replacement for a mental health examination.

Next, defense counsel argues that there is no equitable reason for the Government to examine the defendant in view of the fact that the defense is not examining the defendant (because he will not agree to be examined). The defense is wrong. The purpose for allowing the Government to examine a defendant is not to put the parties on equal footing; it is to aid the truth-seeking mission. This is particularly true here, where defense counsel apparently intends to offer only testimony from mental health experts who have never examined the defendant. Defense

counsel is entirely familiar with the serious problems that can abound when expert testimony is unsupported by the experience of an actual examination of the defendant. In fact, defense counsel has repeatedly asserted in other cases that a mental health expert acts unethically when he renders an opinion about a defendant who he has never examined. See Exhibit A (detailing the problems associated with testimony about a defendant’s mental health from an expert who has not examined the defendant).⁸ As Judge Payne has accurately noted, an examination of the defendant is the “basic tool” of a mental health expert — an expert in a very inexact science. United States v. Beckford, 962 F. Supp. at 758 (citing United States v. Haworth, 942 F. Supp. 1046, 1407-08 (D.N.M. 1996)). “In perspective of these undeniable truths, it is clear that the Government’s ability to rebut a defendant’s evidence of mental condition would be sharply curtailed, if not entirely eviscerated, if notice of a mental health defense is not required and if, thereafter, the Government is not afforded the opportunity to have the defendant examined by an independent mental health expert.” Id. While the defense may be satisfied with introducing the mere speculation of defense-hired experts who have never examined the defendant, the Government believes that the jury is entitled to more. Surely, the “opinions” of defense-hired experts who have never examined the defendant will be undercut when confronted with facts derived from an actual examination of the defendant. Thus, meaningful rebuttal of the defense’s mental health experts, regardless of the basis of their opinions, mandates an examination of the defendant by a Government-retained expert.

⁸ Exhibit A is a motion with affidavits from defense-retained mental health experts filed by Mr. Zerkin in United States v. Stitt, criminal case no. 2:98CR47, a federal death penalty case before Judge Jackson in the Norfolk Division.

The Federal Death Penalty Act (FDPA) also supports the Government's view on its right to examine the defendant. Section 3593(c) provides: "The Government and the defendant shall be permitted to rebut any information received at the hearing, and shall be given fair opportunity to present argument as to the adequacy of the information to establish the existence of any aggravating or mitigating factor" 18 U.S.C. § 3593(c). "The importance of Congress' explicit provision of a fair right of rebuttal cannot be overstated, particularly where the decision of whether to permit rebuttal is ordinarily consigned to the discretion of the trial court." See also United States v. Catalan Roman, 2005 WL 1389612, at *7. "The right to offer rebuttal testimony to mitigating circumstances proffered by the defense would be a hollow one indeed without discovery into the mental condition of an accused at the time of commission of the offense." United States v. Fell, ___ F. Supp.2d ___, 2005 WL 1378780, at*5 (D. Vt. Apr. 7, 2005). "Hence, disclosure is warranted in order to allow the government to acquire and/or develop its own expert testimony if there is to be some semblance of meaningful expert rebuttal." Catalan Roman, 2005 WL 1389612, at *7; see also United States v. Beckford, 962 F. Supp. at 760 ("the Government's statutory right of rebuttal provides implicit authority to require notice, examination and discovery on mental health issues and conditions in order to make that rebuttal right a meaningful one"). Without question, examination of the defendant provides the Government with the most meaningful opportunity to rebut the opinions of defendant's mental health experts.

Defense counsel's final point — that the Government is merely looking for a sanction, because it is clear that the defendant will not submit to an examination — is also unavailing. If the Court were to accept this argument, it would reward the defendant for his recalcitrance. Such a position not only sends the wrong signal to this defendant, but also tells other defendants that

they may enhance their litigation position simply by threatening defiance of court rules. Instead of sending this message, the Court should address this issue in a step-by-step manner as envisioned by Rule 12.2. The Court should first require the defendant to file his notice, if he intends to offer mental health evidence; then, if he files a notice, the Court should order the defendant to undergo a mental health examination by a Government expert; and, only then, if the defendant refuses to comply, should the Court address the issue of sanction. Rule 12.2 sets forth a step-by-step process for addressing this issue and the Court should follow that procedure.

Lastly, defense counsel's assertions that a Court-ordered examination of the defendant would violate his constitutional rights are also meritless. Every court that has addressed this issue has ruled that a defendant waives his Fifth and Sixth Amendment rights when he puts his mental health at issue, so long as the court takes protective measures similar to those set forth in Rule 12.2(c)(2) and Beckford. See United States v. Curtis, 328 F.3d 141, 144-45 (4th Cir. 2003); United States v. Allen, 247 F.3d 741, 773-75 (8th Cir. 2001); United States v. Webster, 162 F.3d 308, 338-40 (5th Cir. 1998); United States v. Hall, 152 F.3d 381, 399-400 (5th Cir. 1998); United States v. Fell, ___ F. Supp. 2d ___, 2005 WL 1378780, at *6 (D. Vt. Apr. 7, 2005); United States v. Johnson, 362 F. Supp. 2d 1043, 1085-91 (N.D. Ia. Feb. 18, 2005); United States v. Taylor, 320 F. Supp.2d 790, 792-93 (N.D. Ind. 2004); United States v. Harding, 219 F.R.D. 62, 63-64 (S.D.N.Y. 2003); United States v. Miner, 197 F. Supp. 2d 272, 274-76 (W.D. Pa. 2002); United States v. Edelin, 134 F. Supp. 2d 45, 49-56 (D.D.C. 2001); United States v. Lee, 89 F. Supp. 2d 1017, 1019 (E.D. Ark. 2000); United States v. Chong, 58 F. Supp. 2d 1153, 1159 (D. Haw. 1999); United States v. Beckford, 962 F. Supp. 748 (E.D. Va. 1997); United States v. Haworth,

942 F. Supp. 1406, 1408-09 (D.N.M. 1996); United States v. Vest, 905 F. Supp. 651, 653 (W.D. Mo. 1995).

IV. The Experts Should Exchange Materials upon which their Opinions are Based

Defense counsel also oppose the Government's request that the Court order the exchange between experts for the defense and the Government of all materials upon which they may rely to form the basis of their opinions. The Government has already turned over to defense counsel all records that it possesses regarding defendant's mental health and will continue to do so. Our reciprocal request here does not seek to be put us on equal standing with defense counsel. On the contrary, we ask only that the defense experts share their records with our expert (when we select our expert following the defense's notice). Employing the procedure set forth by Judge Payne in Beckford, which defense counsel agrees should be employed (see Opposition at 12), the records would not be disclosed to the Government's counsel until their experts' reports are disclosed, after the defendant re-affirms shortly before the beginning of the penalty phase that he will indeed put forth mental health evidence. Moreover, the Government would only use the records to cross-examine the defense experts or in rebuttal. The Government would not introduce during its case-in-chief any records received from the defense.

Defense counsel correctly point out that Judge Payne rejected a similar request by the Government in Beckford. Beckford, 962 F. Supp. at 764 n.16. There is a notable difference, however, between Beckford and this case — namely, the defense experts in Beckford based their opinions principally upon the examinations that they preformed on the defendants. Here, the defense experts will not examine the defendants, so their conclusions will be based upon records, which the Government needs to review to properly cross-examine the experts. Moreover, Judge

Payne rejected the Government's request because he feared that such disclosure would necessarily reveal defense planning and strategy. In this case, we want no records that include defense strategy. Indeed, this concern can be easily eliminated by having defense counsel tender all records for the Court to review *in camera*. If the Court determines that a record would disclose defense strategy, the record could then either be redacted to eliminate the portion that discloses the strategy or withheld in its entirety. Such a procedure would eliminate any defense concerns, while, at the same time, allowing review of the appropriate records by the Government. If the Government is denied access to the records, it cannot adequately cross-examine the conclusions of the defense experts. United States v. Catalan Roman, 2005 WL 1389612, at * 8 ("the need for testing the fundamental reliability of the information before the jury is crucial, and allowing disclosure furthers the goal of heightened reliability by facilitating the separation of the wheat from the shaft through the adversarial process"). Again, because the Government would only use the records to cross-examine the defense experts or in rebuttal, defense counsel has failed to articulate any prejudice which would arise from the exchange of the records between the experts.

V. Conclusion

The Government's demand for discovery as to the defendant's mental health evidence, which is supported by Rule 12.2 and the related case law, serves to ensure that the jury has the most reliable information when it renders the most difficult decision a citizen can be called to make — whether a defendant should live or die. For this reason, the Court should grant the Government's motion and enter an order: (1) requiring the defendant, if he intends to introduce evidence of the defendant's mental health or capacity during the trial, to file a notice of intent not

later than August 1, 2005, specifying: a) the mental health experts who will testify or whose opinions will be relied upon and their qualifications, b) a summary of the diagnosis or diagnoses of said mental health experts and a summary of the basis for their opinions; (2) requiring the defendant, if he gives notice of intent to raise a mental health defense, to submit to an examination by an expert or experts of the Government's choosing; and (3) requiring the exchange between defense and Government experts of all materials upon which they may rely to form the basis of their opinions, including all medical records and other records.

Respectfully submitted,

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Certificate of Service

The undersigned hereby certifies that on the 27th day of June, 2005, a copy of the Government's motion was faxed and mailed to the following attorneys for the defendant:

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